IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 16, 2008 Session

RUSSELL ELLISON ET AL. v. ROSE ELLISON

Appeal from the Chancery Court for Claiborne County
No. 15591 Billy Joe White, Chancellor

No. E2007-01744-COA-R3-CV - FILED SEPTEMBER 29, 2008

This case involves an attempt by Russell Ellison ("Father") and Frances Ellison ("Mother") (collectively "the Grantor Parents"), ages 85 and 77 respectively, to set aside a warranty deed admittedly executed by them to one of their three daughters, the defendant Rose Ellison ("the Grantee Daughter"). Following a bench trial, the court set aside the deed, finding (1) that the Grantee Daughter had taken "improper advantage" of her parents; (2) that Mother was "not mentally competent" to convey the property; and (3) that the consideration for the conveyance was "clearly inadequate." The Grantee Daughter appeals, raising five issues. We modify the trial court's judgment. As modified, it is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court, as Modified, is Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Greg Leffew, Rockwood, Tennessee, for the appellant, Rose Ellison

Thomas J. Tabor, Jr., Tazewell, Tennessee, for the appellees, Russell Ellison and Frances Ellison

OPINION

I.

In their complaint to set aside – as later amended – the Grantor Parents alleged that they conveyed their 94.12-acre dairy farm to the Grantee Daughter, reserving to themselves a life estate. They claimed that the deed should be set aside on three grounds, two of which are closely related: (1) that both of them lacked sufficient capacity to execute the deed; (2) that the Grantee Daughter failed to "provid[e] bargained-for consideration;" and (3) that "any consideration that was mentioned

[in] the alleged deed . . . , was sham consideration and not valid to support any conveyance." The "sham" nature of the consideration was not otherwise described in the complaint.

This case was heard by the court below at a bench trial on April 4, 2007. At the beginning of the trial, the court noted that it had read the pleadings and understood that the issues pertained to "lack of capacity, lack of consideration, and those things." Counsel for the Grantor Parents then verbally acknowledged that these were, in fact, the issues. Neither the parties nor the court mentioned undue influence as an issue at this juncture in the proceedings.

After several witnesses testified in what turned out to be a one-day trial, the parties rested. The trial court then asked for argument, after which the following occurred:

> MR. TABOR [Attorney for Ellisons]: Yes, Your Honor, I'd like to argue just a little bit. Your Honor, we filed a case, Mr. Ellison had come today and I had been down there two or three times to discuss this case with him, and it's his intention or was his intention that he did not convey that he had stated that to you and to this court that he did not intend to convey his property away. You've heard the evidence, you've heard both sides of the evidence that's been given, and we think that there was a relationship between him and his daughter, the attorney, Rose Ellison.
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> That relationship got closer and then it got more personal and involved when the Power of Attorney was executed on the same day the warranty deed was and we would cite to Your Honor some case law that has been given out. I think I've sent it to opposing counsel and also I've sent –
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> MR. LEFFEW: Your Honor, these cases that he sent me at 4:30 yesterday dealt with undue influence and confidential relationships. Now, he has not raised that in his pleadings. His pleading only alleges lack of capacity to sign a deed and lack of consideration for the deed. Undue influence is not an issue in this case and he can't come in the back door at argument and try to go that route.
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> MR. TABOR: I'm not arguing undue influence, –
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> THE COURT: You should be. I'll allow an amendment.

After both sides had argued, the trial court rendered its opinion from the bench. As pertinent to the issues on appeal, the court stated as follows:

> THE COURT: I don't need any more argument. The Court's going to

make certain findings of fact. One is that Rose Ellison, one of the three daughters of Mr. and Mrs. Ellison, is an attorney practicing law here in Claiborne county and she has testified that she represented her parents over a period of ten years up till and through the date of this deed, and, of course, the Court's aware that she represented her in certain cases, she represented her once in this court, represented her parents, did a good job.

But the Court finds that she had a close personal relationship with her parents, that she was transacting much of their business for them at this time, and that between these parties there was a confidential relationship certainly even born out with the fact that they had given her a home in '95 and then 2005 this deed was signed and on the same date the Power of Attorney giving her the authority to transact her business, pay debts and so forth. So it's the opinion of this Court that there being a fiduciary relationship and Rose Ellison being the dominant party that she received a gift or benefit from her parents and that a presumption arises that improper advantage was taken and takes clear and convincing evidence to set aside that presumption.

That evidence is not in this record. I think the evidence is clear that there is a confidential relationship and that these old people were overreached clearly. They transferred a farm for $30,000 that has a tax appraisal of 300,000 plus probably worth 400,000. The consideration is clearly inadequate. There arises in this case a very serious problem of the mental competence of the parties making this transaction. Mr. Ellison is now 85 years of age and perhaps was mentally competent at the time this deed was made. There's not really sufficient evidence to hold that he was not mentally competent but this property is jointly owned by he and his wife and the evidence is overwhelming that the wife was not mentally competent to convey property.

Bob Owens never said she understood this transaction. Bob Owens said he asked Mr. Ellison if he knew what he was doing and he said yes and Mrs. Ellison nodded her head, or something, and Mrs. Ellison has been here in this courtroom all day and has said nothing. She is diagnosed by three different doctors as having dementia and Dr. William M. Smith in particular says she's absolutely incompetent at the time of this transaction to make such a transaction. The deed would have to be set aside solely on that.

They did not receive any independent advice, had these people gone

> to Bob Owens' attorney at law, and just with them and him and sat down and you not had a lot of the other problems, and had he advised them what they were doing and give them independent advice we'd have a different situation. But when you have this overreaching of a dominant party in a fiduciary relationship in order to get away with that you have to have independent advice. That was not done in this case. Mr. Owens made no attempt whatsoever to advise as to whether or not the deal they were making is good, bad, or indifferent.
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> * * *
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> MR. LEFFEW: Well, Your Honor, she does have over $30,000 invested in this property. I believe the law allows her to get that back and have a lien to secure it.
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> THE COURT: Well, I need to make a finding of fact on that. The evidence is so uncertain as to I don't know what she's got in it. She had a Power of Attorney, she was obviously receiving income. She was making payments for these people. She was using their money to make some of these payments, I'm sure, and there's just absolutely no way I can say there's no deed written, no check written to them for $30,000.
>
> Had it been she's entitled to her money back. But under the proof in this case at this point I can't find that she paid 30,000. I don't know what she paid. Certainly, she's not entitled to charge them 5 or $600 a month secretary charges. The Court can't make any finding on that because the evidence is just not adequate to make it.

On May 14, 2007, the Grantor Parents – following up on the trial court's directive on the issue of undue influence – filed a pleading styled "Amended Complaint to Set Aside Warranty Deed Pursuant to Sua Sponte Order" in which they raised – for the first time *by them* – the claim of undue influence by the Grantee Daughter. The trial court entered an "Order of Judgment" on May 23, 2007, essentially incorporating its oral findings of fact and its conclusion that the deed should be, and was, set aside.

II.

The Grantee Daughter presents five issues – issues that raise the following questions:

> 1. Did the trial court abuse its discretion, in allowing, sua sponte, an amendment to the complaint to allege undue influence?

2. Did the trial court err in holding that Frances Ellison lacked capacity to execute a deed?

3. Did the trial court err in receiving into evidence an appraisal of the subject property's value by the Claiborne County Tax Assessor?

4. Did the trial court err in holding that the record was inadequate to support a finding of consideration for the deed transfer to the Grantee Daughter?

5. Did the trial court err in failing to return to the Grantee Daughter the $30,000 she claimed was consideration for the deed transaction?

III.

Our review is *de novo* upon the record of the proceedings below; however, that record comes to us with a presumption that the trial judge's factual findings are correct. Tenn. R. App. P. 13(d). We must honor this presumption unless we find that the evidence preponderates against those findings. ***Id.***; ***Hass v. Knighton***, 676 S.W.2d 554, 555 (Tenn. 1984). Our review of the trial court's conclusions on matters of law, however, is *de novo* with no presumption of correctness. ***Taylor v. Fezell***, 158 S.W.3d 352, 357 (Tenn. 2005). We likewise review the trial court's application of law to the facts *de novo*, with no presumption of correctness. ***State v. Thacker***, 164 S.W.3d 208, 248 (Tenn. 2005) (citation omitted); ***Clark v. Clark***, No. M2006-00934-COA-R3-CV, 2007 WL 1462226, at *3 (Tenn. Ct. App. M.S., filed May 18, 2007).

Trial courts, unlike appellate courts, are able to observe witnesses as they testify and to assess their demeanor and other indices of credibility. Thus, trial courts are in a unique position to evaluate witness credibility. *See* ***Bolin v. State***, 405 S.W.2d 768, 771 (Tenn. 1966). Accordingly, appellate courts will not re-evaluate a trial court's assessment of witness credibility absent clear and convincing evidence to the contrary. *See* ***Wells v. Tennessee Bd. of Regents***, 9 S.W.3d 779, 783 (Tenn. 1999), ***Humphrey v. David Witherspoon, Inc.***, 734 S.W.2d 315, 315-16 (Tenn. 1987).

IV.

A.

It has long been the rule that failure to plead or otherwise raise a claim in a timely manner prevents a party from recovering on the claim at trial. ***Castelli v. Lien***, 910 S.W.2d 420, 429 (Tenn. Ct. App. 1995).[1] Rule 15.02 of the Rules of Civil Procedure modifies the general rule and allows

[1]Justice Scalia of the United States Supreme Court has stated the importance of this rule in strong terms: "The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." ***United States v. Burke***, 504 U.S. 229, 246 (Scalia, J., concurring.) (Citation omitted.)

a pleading to be amended, even after judgment, if an issue not raised in the pleadings was tried with the parties' express or implied consent. Tenn. R. Civ. P. 15.02 (2007). The Rule provides as follows:

> When issues not raised by the pleadings are tried by *express or implied consent of the parties*, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues *may be made upon motion of any party at any time, even after judgment*; but failure so to amend does not affect the result of the trial of these issues. Provided, however, amendment after verdict so as to increase the amount sued for in the action shall not be permitted. *If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice that party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.*

Id. (Emphasis added.) In this case the trial court, on its own motion, effectively amended the complaint to add a claim of undue influence after all the proof was in and before judgment.

The Grantor Parents do not argue that there was express consent to try the case on the theory of undue influence. Nor could they. The attorney for the Grantor Daughter immediately objected when the claim was raised for the first time – in closing argument – and the Grantor Parents' attorney explicitly stated in response that he was not arguing undue influence. The inquiry in this case is thus whether the parties impliedly consented to the trial of the issue of undue influence.

In ***Zack Cheek Builders, Inc. v. McLeod***, 597 S.W.2d 888 (Tenn. 1980), the Supreme Court stated that, in general, implied consent will be found where the party opposed to the amendment knew "or should reasonably have known of the evidence relating to the new issue, did not object to this evidence, and was not prejudiced thereby." ***Id***. at 890. (Citation omited.)

The Grantor Parents argue:

> It is obvious that the Court found implied consent existed prior to its decreed [sic] due to the overall facts and surrounding circumstances of this case. For example, the Power of Attorney document was presented to the Court in the initial pleadings . . . and continuously mentioned throughout the Court record. The Power of Attorney was cited within the pleadings, due to the fact that Attorney Rose Ellison

> was the beneficiary of the Warranty Deed from her parents and further had Power of Attorney over her father, Russell Ellison, both documents being executed on August 4, 2005.

Neither the bench opinion or subsequent "Order of Judgment" indicates that the trial court found implied consent of the parties to try the issue of undue influence. The record is simply silent on the issue of implied consent.

The power of attorney came into the record through David Standifer, an attorney, who had previously represented the Grantor Parents in this same matter. Mr. Standifer testified that, as the attorney for the Grantor Parents, he had reviewed the deed and power of attorney at issue and drafted a revocation of the power of attorney.

The Grantee Daughter had no reason whatsoever to believe that the evidence being offered through Mr. Standifer concerning the power of attorney was being offered for the purpose of proving a claim of undue influence, which had not been raised in the pleadings. Nor did she have reason to believe that the references in the pleadings to the power of attorney were placed there in order to argue undue influence. Rather, as the Grantee Daughter contends, the testimony concerning the power of attorney, the Grantee Daughter's relationship with her parents, the transaction of their business, the gift from them to her of a home in 1995, the signing of the deed at issue in this case, her transaction of business for them and payment of their debts, was all evidence admitted on the issue of consideration, an issue that had been raised in the pleadings.

The Grantee Daughter relies on numerous cases in which the courts, citing the principles set forth in ***Zack***, have concluded that implied consent does not occur when evidence claimed to be supporting an issue not raised in pleadings is also relevant to an issue that is actually raised in the pleadings. *See, e.g.*, ***Hiller v. Hailey***, 915 S.W.2d 800, 805 (Tenn. Ct. App. 1995) (trial of issue by consent not shown by evidence serving dual purpose). *Accord* ***Vantage Tech., LLC v. Cross***, 17 S.W.3d 637, 649 (Tenn. Ct. App. 1999) ("Presentation of evidence that is relevant to both a pled issue and a non-pled issue does not establish trial of the non-pled issue by implied consent." (citing ***Hiller v. Hailey***, 915 S.W.2d at 805)); ***Davis v. Estate of Flynn ex rel. Poole***, E2001-02480-COA-R3-CV, 2002 WL 31174229, at *7 (Tenn. Ct. App. E.S., filed September 30, 2002) (implied consent not found where plaintiffs did not knowingly acquiesce in introduction of evidence relating to issues beyond pleadings and had no reason to believe that evidence was offered to prove theory not in pleadings). *But see* ***Redbud Coop. Corp. v. Clayton***, 700 S.W.2d 551, 558 (Tenn. Ct. App. 1985) (implied consent found to try all legal theories against developers where legal theories pursued were unclear to both parties and, following amendments after the proof by both parties, trial court decided case without stating with precision the basis upon which relief was granted.)

At the beginning of the trial, counsel for the Grantor Parents acknowledged that the two issues being tried were whether there was consideration for the deed and whether the Grantor Parents had the mental capacity to execute the deed. Undue influence was not mentioned. Counsel for the

Grantee Daughter argues that he would have requested a continuance to prepare to defend against a claim of undue influence if the Grantee Parents' attorney had advised, at the beginning of the trial, that he relied on undue influence instead of affirming to the court that capacity and consideration were the only two issues.

When the Grantor Parents' attorney attempted to introduce the issue of undue influence during his closing argument, the Grantee Daughter's attorney immediately objected that the issue of undue influence had not been pleaded and he stated that he did not think the Grantor Parents should be allowed to raise the issue for the first time in closing argument.

In these circumstances, it is clear that counsel for the Grantee Daughter did not know the issue of undue influence was being tried; nor should he have reasonably known it. In addition, he timely objected as soon as the issue was raised. The remaining question in the analysis then is whether the Grantee Daughter was prejudiced by the court's *sua sponte* amendment to add undue influence as a claim after the proof was in.

The ***Zack*** court quoted ***Browning Debenture Holders' Comm. v. Dasa Corp***., 560 F.2d 1078 (2d Cir. 1977), which sets forth factors to consider in determining what constitutes prejudice. Two factors mentioned are whether there had been a fair opportunity to defend and whether the party objecting to the amendment could offer any additional evidence if the case were retried on the new theory. ***Zack***, 597 S.W.2d at 891 (quoting ***Browning***, 560 F.2d at 1086 (citations omitted). *See also* ***Saalfrank v. O'Daniel***, 533 F.2d 325, 330 (6th Cir. 1976).

Nothing in the record suggests that the trial court considered whether the amendment to the complaint to add a claim of undue influence would prejudice the Grantee Daughter. In addition, once there was notice of the claim in closing argument, there was no opportunity for the Grantee Daughter to defend against that claim or rebut any presumption that she took improper advantage of her parents. In the bench opinion, the trial court states:

> So it's the opinion of this Court that there being a fiduciary relationship and Rose Ellison being the dominant party that she received a gift or benefit from her parents and that a presumption arises that improper advantage was taken and takes clear and convincing evidence to set aside that presumption.
>
> That evidence is not in this record. . . .

There was no evidence in the record to rebut the presumption because the attorney for the Grantee Daughter had no notice the claim of undue influence was being raised until after the proof was closed. Although the trial court, *sua sponte*, amended the complaint to add the theory of undue influence, the court did not allow counsel for the Grantee Daughter an opportunity to place any evidence, including rebuttal evidence, in the record. In this court, counsel for the Grantee Daughter argues:

> When she prepared for this trial, Rose Ellison had no reason to locate proof showing that no confidential relationship [existed] at the time the deed was executed. Had she known undue influence was to be an issue, she could have presented evidence, both documentary and testamentary, showing whether an attorney-client relationship existed on the date the deed was executed.

We find that the trial court abused its discretion by *sua sponte* amending the complaint to allege undue influence and then finding undue influence. The judgment is modified to delete undue influence as a supporting ground for the trial court's judgment.

B.

The Grantee Daughter contends that Mother was mentally competent to execute the subject deed and that the trial court erred in finding otherwise.[2] A deed executed by a mentally unbalanced grantor with no intelligent comprehension of the act being performed is void. ***Bright v. Bright****,* 729 S.W.2d 106, 109 (Tenn. Ct. App. 1986).

The Grantor Parents had the burden of proof on this issue. ***Fell v. Rambo,*** 36 S.W.3d 837, 846 (Tenn. Ct. App. 2000). The mental capacity required to execute a warranty deed is essentially the same as the mental capacity required to enter into a contract. ***In re Conservatorship of Davenport*****,** E2004-01505-COA-R3-CV, 2005 WL 3533299 at *17-18 (Tenn. Ct. App. E.S., filed December 27, 2005).

In discussing the issue of mental capacity to execute instruments, in ***Roberts v. Roberts****,* 827 S.W.2d 788 (Tenn. Ct. App. 1991), this court relied on the following language from Corpus Juris Secundum:

> The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the act or transaction in which he is engaged; the law does not gauge contractual capacity by the standard of mental capacity possessed by reasonably prudent men. It is not necessary to show that a person was incompetent to transact any kind of business, but to invalidate his contract it is sufficient to show that he was mentally incompetent to deal with the particular contract in issue, . . .
>
> On the other hand, to avoid a contract it is insufficient to show merely that the person was of unsound mind or insane when it was made, but it must also be shown that this unsoundness or insanity was of such

[2]The trial court found that there was not sufficient evidence to hold that Father was mentally incompetent when he signed the deed at issue. No one challenges this finding.

> a character that he had no reasonable perception or understanding of the nature or terms of the contract. The extent or degree of intellect generally is not in issue, but merely the mental capacity to know the nature and terms of the contract.

Id. at 791-92 (quoting 17 C.J.S. *Contracts* § 133(1)(e)).

Ultimately, contractual capacity is a question to be resolved on the facts of each case and the surrounding circumstances. ***Id***. at 792. The Grantee Daughter argues, in part, that her mother was competent to make the deed because she wrote checks and signed loan papers in 2005 and 2006 and signed a bill of sale to transfer ownership of a car in 2006.

Whether Mother was able to conduct business of various kinds during the year in which she signed the deed is not the inquiry, however. It was not necessary for the Grantor Parents to show that Mother was incompetent to transact *any* kind of business. ***Id***. (quoting 17 C.J.S. *Contracts* § 133(1)(e)). Rather, it was sufficient to show that she was mentally incompetent to deal with the particular deed transaction at issue in that she had no perception or understanding or the nature or terms of the deed.

The trial court found "overwhelming" evidence that Mother lacked the mental capacity to execute the deed on the date it was signed. The court considered the testimony of all the witnesses and placed emphasis on the testimony of three medical doctors, all of whom diagnosed Mother with dementia.

The Grantee Daughter asserts that the trial court erred in relying on the testimony of Dr. William M. Smith because he saw Mother only once in 2002 and once in 2003, and he did not see her again until 2007. If Dr. Smith had been testifying as a treating physician, the number of times he had seen Mother would go to his credibility and the weight of the evidence. Dr. Smith, however, was an expert witness who wrote a report and testified to his medical opinion on behalf of the Grantor Parents. Thus, Dr. Smith, who has practiced medicine for 48 years, was able to testify as a fact and opinion witness that in 2002 and 2003, Mother was not capable of making decisions. When asked whether in 2005 she could have understood a deed conveying her interest in property, after reviewing the document, Dr. Smith expressed his expert opinion that "[t]here is no way she could understand this."

In the deposition of Dr. Smith, the attorney for the Grantee Daughter asked, "In August of 2005 when Mrs. Ellison signed this Deed that's at issue you really don't know what effect the Alzheimer's was having on her that particular day do you?" Dr. Smith acknowledged that he did not have personal knowledge, but gave his expert opinion, stating, "The way she was deteriorating I would say without any question she was completely mentally incompetent . . . she would not have been alert enough to have done anything of that type."

The Grantor Daughter also claims that the trial court erred in finding Mother mentally incompetent to sign the deed in August 2005 because Dr. Luis C. Pannocchia noted in his medical records on two occasions in 2005 and one in 2006 that Mother was oriented as to time, place and

person when she visited his office. Dr. Pannocchia's records do reflect those entries. But, when asked about Mother's cognitive ability to know, read and understand in 2003, Dr. Pannocchia gave his medical opinion that "it would have been difficult for her to . . . understand." He also noted that he was treating Mother "for colds, high blood pressure, just really routine things."

In reaching its conclusion that Mother lacked the capacity to sign the deed at issue, in addition to the medical evidence, the trial court also relied on the testimony of Bob Owens, a bank manager who knew the parties and notarized the deed. Mr. Owens was called as a witness on behalf of the Grantee Daughter. He testified that Mother did not speak on the day the deed was signed. Mr. Owens said that he asked Father if he knew what he was doing and Father said yes, and Mother "shook her head yes." The trial court buttressed Mr. Owens' statements with its own observation that Mother did not speak throughout the day of the trial.

Based upon all the evidence, the trial court found that Mother was mentally incompetent when she executed the deed. We hold that the evidence does not preponderate against the trial court's finding that Mother lacked capacity to execute the deed.

C.

On appeal, the Grantee Daughter argues that the trial court erred by receiving into evidence tax appraisal cards of the subject property's value, which cards originated in the Claiborne County Tax Assessor's Office. Grantee Daughter relies on eminent domain cases that hold admission of a tax assessment into evidence is error. *See, e.g.*, ***Wray v. Knoxville, LaFollette & Jellico R.R. Co.***, 113 Tenn. 544, 82 S.W. 471 (Tenn. 1904). More recently, this court held that a jury instruction was clearly erroneous because tax assessments may not be considered to determine fair compensation in an eminent domain case. ***Knoxville Cmty. Dev. Corp. v. Bailey***, E2004-01659-COA-R3-CV, 2005 WL 1457750, at *6 (Tenn. Ct. App. E.S., filed June 21, 2005).

The question concerning admissibility of the tax cards in this case, however, is an issue that must be judged in light of how the issue came up at trial. The attorney for the Grantor Parents called the Grantee Daughter to testify. The tax cards came into evidence during her examination by the Grantor Parents' counsel, as follows:

> A. Well, he came to me on May 18th and apologized to me and brought me the new tax assessment cards which I have those as well that had come to him in the mail and told me that he knew he deeded it to me and it was mine and he gave me those tax assessment cards.
>
> Q. And when he come to you did he tell you that he wanted the land back?
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> A. No.
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> THE COURT: Do you have the tax assessment cards?

MS. ELLISON: Yeah, I've got them.

THE COURT: I'd like to see it.

MS. ELLISON: This is the envelope he brought them to me [in] and they're in there.

THE COURT: Three tracks [sic]. Did they have them assessed?

MS. ELLISON: They got them put into two because the creeks just divided one of them and they were put together so he'd get on the greenbelt. I'll file them in the envelope.

THE COURT: It says value 317,700.

MR. TABOR: For the entire amount, Judge?

THE COURT: That's what – if I don't – 317,700 total.

Q. On this market of value did you dispute the value to the tax assessor's office?

A. No.

* * *

MR. LEFFEW: I'd like to make these tax cards an exhibit, Your Honor.

MR. TABOR: No objection.

(Exhibit No. 21 was filed.)

The Grantee Daughter, a lawyer herself, argues in this court that the tax cards should not have been entered into evidence. But she brought the tax cards to court and took them on the witness stand with her. She then volunteered that she had them with her. The cards were discussed by the Court, the witness and opposing counsel, and the Grantee Daughter's attorney did not object. Then the Grantee Daughter's attorney himself moved that the tax cards be made an exhibit. Although Grantee Daughter argues in this court that the cards were entered for the limited purpose of indicating that Father delivered the cards to the Grantee Daughter and thus arguably acknowledged that she owned the farm, the record does not reflect such a limitation. Rather, there was no objection when the cards were discussed concerning value of the farm during the testimony of the Grantee Daughter, and no limitation was stated when the Grantee Daughter's attorney asked that the cards be placed in the record. This issue thus was not preserved for appeal. Tenn. R. App. P. 3(e). ***State v. Webb***, No.

03C01-9203-CR-77, 1993 WL 52815 (Tenn. Ct. App. E.S., filed March 2, 1993) ("[I]ssues are deemed waived because there was no objection in the trial court at the time of the alleged error. One who participates in an error, or invites error, is not entitled to relief. T.R.A.P. 36 (a).") Thus, the trial court did not err in admitting the tax cards into the record.

D.

Consideration is a necessary ingredient of every contract. ***Dobbs v. Guenther***, 846 S.W.2d 270, 276 (Tenn. Ct. App. 1992). Since a deed is a contract, it must have consideration to be valid. ***Richards v. Taylor***, 926 S.W.2d 569, 571 (Tenn. Ct. App. 1996).

In this case, the deed, when signed, recited that the consideration was "ten ($10.00) Dollars . . . ." When Grantee Daughter recorded the deed two months after the Grantee Parents signed it, she filled out the oath required by Tenn. Code Ann. § 67-4-409,[3] affirming "that the actual consideration for the transfer or value of the property transferred, whichever is greater" was $30,000.

Generally, it is not required that consideration be adequate in the sense that it represents actual value, ***Lloyd v. Turner***, 602 S.W.2d 503, 509 (Tenn. Ct. App. 1980), and a contract will not be set aside for mere inadequacy. ***Farrell v. Third Nat'l Bank***, 20 Tenn. App. 540, 101 S.W.2d 158, 163 (Tenn. Ct App. 1936). However, where the inadequacy of consideration is not the sole issue and the case involves other inequitable incidents, relief is more readily granted. ***Woodard v. Bruce***, 47 Tenn. App. 525, 536, 339 S.W.2d 143, 148 (1960). Whether there is adequate consideration is a matter of law and may be reviewed by this court *de novo*. ***Applewhite v. Allen***, 27 Tenn. 697 (1848).

Arguing that the consideration was adequate in this case, the Grantee Daughter relies on a number of cases in which consideration in transfers of property among family members have been upheld even though the terms of the deed would be unsatisfactory if the transactions were between strangers. The Grantee Daughter testified that her father set the price at $30,000 based upon what he had paid for the land. She stated, "[H]e said since I already owned my house and since I had done so much for him over the years it would only be fair to sell it to me for a lower price and he said $30,000.00."

That the Grantee Daughter owned her own home, which her parents gave to her in 1995, cannot be a basis for consideration for the additional transfer of the farm. Nor can the fact that the Grantee

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[3]The statute provides:

> On the transfer of a freehold estate, the tax shall be based on the consideration for the transfer, or the value of the property, whichever is greater. "Value of the property," as used in this section, means the amount that the property transferred would command at a fair and voluntary sale, and no other value; . . .

Tenn. Code Ann. § 67-4-409(a)(1) (2007).

Daughter had performed past acts of kindness for her parents be considered as consideration. Past acts are not consideration. ***Bratton v. Bratton***, 136 S.W.3d 595, 604 (Tenn. 2004) (citation omitted).

The Grantee Daughter does not claim that, in addition to paying $30,000.00, she agreed to perform any future acts, such as taking care of her parents for their lifetimes. And the record indicates that there was no family discussion among the parents, the Grantee Daughter and her two siblings to the effect that the parents were deeding the farm to the Grantee Daughter. Nor does the Grantee Daughter claim love and affection were the bases of consideration. This case simply does not fit into the line of cases about transactions among family members.

To the contrary, the case involves the issue of consideration combined with questions about the equities of the transaction. The trial court found as fact that the Grantee Daughter was an attorney who had represented her parents for a period of 10 years, including through the date of the deed. She drafted the deed. The court found that a close relationship existed between the parents and the Grantee Daughter and that she had, for a period of time, had a power of attorney for Father. In 1995 the parents had given her a home. The court found that improper advantage was taken of the parents and stated that the evidence was clear that "these old people were overreached." The trial court then concluded: "They transferred a farm for $30,000.00 that has a tax appraisal of 300,000 plus probably worth 400,000. The consideration is clearly inadequate."

Although the trial court made its findings concerning the overreaching in the context of determining whether there was undue influence, the subject proof came into the record on the issue of consideration. When reviewing the record *de novo*, we considered the evidence as presented, and we conclude that the trial court did not err in holding that the record was inadequate to support a finding of consideration for the deed transfer to the Grantee Daughter.

In this case a second issue arises, however, concerning whether, as a matter of fact, alleged consideration of $30,000.00 was paid. Grantee Daughter argues that she produced receipts for payments of more than $30,000.00 toward the Grantee Parents' debts and those payments are consideration for the deed. She states that the Grantee Parents did not challenge the authenticity of these receipts. She also argues that the Grantee Parents did not present evidence that the monies represented by the receipts were monies that came from anyone other than her.

The Grantee Parents do not dispute the authenticity of the receipts, that the items were, for the most part, paid for their benefit, or that the monies came from the Grantee Daughter. Nor, apparently, do they dispute that the receipts were paid after the transfer. Father testified, however, that he had not received any money for the deed.

The receipts submitted into evidence by the Grantee Daughter do not on their face show they are consideration for the transfer. Although Grantee Daughter testified that she made various payments on behalf of her parents and she considered the payments to be toward the consideration for the deed, there is no evidence of the nexus between the payments and the deed except for Grantee Daughter's assertions to that effect.

In addition, the trial court was not satisfied with the proof concerning the various payments and made specific findings of fact concerning them. The Court stated:

> Well, I need to make a finding of fact on that. The evidence is so uncertain as to I don't know what she's got in it. She had a Power of Attorney, she was obviously receiving income [from the farm]. She was making payments for these people. She was using their money to make some of these payments, I'm sure, and there's just absolutely no way I can say there's no deed written, no check written to them for $30,000.
>
> Had it been she's entitled to her money back. But under the proof in this case at this point I can't find that she paid 30,000. I don't know what she paid. Certainly, she's not entitled to charge them 5 or $600 a month secretary charges. The Court can't make any finding on that because the evidence is just not adequate to make it.

The trial court made a finding of failure of consideration in that the court could not tell if *any* of the consideration was paid by the Grantee Daughter. The trial record comes to this court with a presumption that the trial judge's factual findings are correct. Tenn. R. App. P. 13(d). We thus find that the evidence does not preponderate against this finding.

Failure of consideration is grounds for rescinding a contract for the sale of property. ***Lloyd***, 602 S.W.2d at 509 (quoting 1 Black on Rescission 512, Sec. 198); *cf.* ***Buhl v. Vradenburg***, No. 85-238-II, 1986 WL 15699 (Tenn. Ct. App. M.S., filed March 12, 1986). In ***Lloyd***, the court noted that

> [a] partial failure of performance of a contract will not give ground for its rescission unless it defeats the very object of the contract or renders that object impossible of attainment or unless it concerns a matter of such prime importance that the contract would not have been made if default in that particular had been expected or contemplated.

Lloyd, 602 S.W.2d at 509 (citations omitted). From the proof we find that passing title from both Grantor Parents was of such prime importance that the deed transfer would not have been made if the parties had realized that Mother's transfer would be void because of her incompetency. The trial court therefore did not err in ordering a rescission of the deed.

E.

The Grantee Daughter argues that the trial court erred in failing to return to her the $30,000 she claimed was consideration for the deed. She argues that a deed cannot be rescinded unless the purchaser is restored to the same position she occupied before the transaction. The problem, however, is that this argument assumes that the monies the Grantee Daughter paid were paid for the purpose of being consideration for the deed. The trial court was troubled that no check was written to the Grantee Parents in the amount of $30,000 for consideration. And the trial court made factual findings that the proof in the case was such that he could not even find that the Grantee Daughter paid $30,000, stating, "I don't know what she paid."[4] We hold that the evidence does not preponderate against the trial court's finding that the payments claimed to be made cannot be recovered in the absence of proof that the amounts were, in fact, paid and that any amounts paid were, in fact, for the purpose of being consideration.

V.

The judgment of the trial court is modified, and, as modified, it is affirmed. Costs on appeal are taxed to the appellant, Rose Ellison. This case is remanded to the trial court for enforcement of the trial court's judgment, as modified, and for collection of costs assessed below, all pursuant to applicable law.

_____

CHARLES D. SUSANO, JR., JUDGE

[4] Several receipts were written by the Grantee Daughter to herself for cash payments that she purportedly made toward the $30,000 amount. She also paid herself for secretarial-type services for several months and counted those amounts toward the $30,000.